Supreme Court, U.S.
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No. 95-1937

In The

Supreme Court of the United States

October Term, 1995

BERNARD SCHWARTZ,

Petitioner,

v.

DOC'S FOOD STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Oklahoma, Division No. 1

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent in No. 95-1937 rewrites the holdings in the cases cited in its opposing brief. This may be seen from analysis of the cases cited:

1) *Iowa Life Insurance Co. v. Lewis*, 187 U.S. 337 (1902), held a statute authorizing attorney fees against life and health insurance companies not repugnant to equal protection. The instant Petition claims a violation of due process, which is not met by the holding that life and health insurance companies are not denied equal protection by a loser-pays requirement only upon such insurance companies.

The *Lewis* Court also stated, *id.* at 355, that it was following "the case and its reasoning" in *Mutual Life Assn. v. Mettler*, 185 U.S. 308, 326 (1902), where the Court, stated,

> It is apparent . . . that this particular liability amounted to one of the conditions on which life and health insurance companies were permitted to do business in [the State], and the power of the State in . . . the imposition of conditions on its own and foreign corporations, has been repeatedly recognized by this court.

This rationale plainly does not apply in the instant case.

2) *Missouri, Kansas and Texas Ry. v. Cade*, 233 U.S. 642 (1914), rejected the claim that a loser-pays rule for plaintiffs suing railroads "for overcharges" was unconstitutional. It should, however, be emphasized that the statute there allowed only an attorney fee of $20 (even with inflation, far less than one day's attorney's fees today) and, as *Chicago & N.W. Ry. v. Nye-Schneider-Fowler*, 260

U.S. 35, 43 (1922), explained, under the *Cade* statute, "the attorney's fee . . . was manifestly only costs of suit" – i.e., the low statutory amount made the $20 fee part of the "costs" assessed since it did not require payment of actual attorney fees.

3) *Chicago & N.W. Ry. v. Nye-Schneider-Fowler,* 260 U.S. 35 (1922), upheld a statute requiring carriers who lost suits for property loss or overcharges to pay attorney fees. The court explained *Cade, supra,* and other cases:

> The general rule to be gathered from this extended review of the cases is that common carries . . . may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries . . . and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees.

This rationale, too, is plainly inapplicable to the instant case.

More important is the fact that the above cases were decided well before this Court developed strict-scrutiny review in cases involving fundamental rights, such as that of access to the courts. To judge the loser-pays statute in this case by only the rational-basis test (the only review standard early in the century) would be similar to applying the rule in *Davis v. Massachusetts,* 167 U.S. 43 (1897), in a freedom of speech case today (It should be noted that, even under the narrow review test, *Nye-Schneider-Fowler, supra,* ruled invalid a requirement that the losing carrier pay appellate attorney fees, saying,

"This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment. . . . the principle applies to . . . so much of the statute as imposed an attorney's fee upon the carrier in this case in the [Nebraska] Supreme Court." *Id.* at 47-48. As the Petition shows, this can be said as well today of the loser-pays rule at the trial level.)

4) *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023 (1994), upheld a statute providing, "the court may . . . award a reasonable attorney's fee to the prevailing party" in copyright cases. This Court stressed that the statute did not adopt "the British rule" because it used the word "may," stating, "The word 'may' clearly connotes discretion. The automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion." *Id.* at 1033. The British rule's "automatic awarding of attorney's fees" is exactly what the challenged Oklahoma statute requires, since it provides that the prevailing party "*shall* be allowed" attorney's fees.

The Alaska cases referred to by respondent are not cited in the Petition for their holdings, but to show that, in the given case, it may be "true that the amount of the attorney's fee . . . charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger amount. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved." *Gulf, Colorado Ry. v. Ellis*, 165 U.S. 150, 153-154 (1897).

Respondent also cites *Thayer v. Phillips Petroleum*, 613 P.2d 1041 (Oklahoma 1980). But it held only that a one-way loser-pays rule imposed on defendants who transfer cases from small claims court to the general jurisdiction court does not violate equal protection. Once again, that is not the question presented in the Petition.

The Petition itself pointed out that the fact-pattern in *Moore v. Local 569*, 53 F.3d 1054 (9th Cir. 1995), was not on all fours with the instant case. But the *Moore* court's rationale and language are directly applicable to this case. Indeed, this Court has used similar language, as quoted in the Petition, p. 8. Equally pertinent is the statement by Justice Goldberg:

> It has not been accident that the American litigant must bear his own cost of counsel . . . but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means . . . the English system [was] never accepted by us because of our conviction that it "favored the wealthy and unduly penalized the losing party." Concurring, in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 237 (1964).

Justice Goldberg concluded his opinion:

> Judge Learned Hand once properly observed: "After now some dozen years of experience I must say that as a litigant I should dread a law suit beyond almost anything else short of sickness and death." I would not intensify that dread. *Id.* at 239.

For "that dread" to be further lessened, an answer by this Court to the question presented is now in order.

Respectfully submitted,

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